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SIMPANG EMPAT PLANTATION SDN BHD

v.

ALI TAN SRI ABDUL KADIR & ORS

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COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RAHMAH HUSSAIN JCA
VINCENT NG J
[CIVIL APPEAL NO: A-02-139-1997]

C

1 DECEMBER 2005

CIVIL PROCEDURE: *Action - Res judicata - Whether allowing second suit will favour an abuse of process*

D

COMPANIES AND CORPORATIONS: *Receivership - Powers of receivers and manages to sell property*

COMPANIES AND CORPORATIONS: *Receivers - Receiver's personal liability - Whether receivers and managers may be liable for misfeasance - Companies Act 1965, s. 192(2)*

E

LAND LAW: *Charge - Enforcement of - Powers of receivers and managers to sell land under debenture and charge*

F

In an earlier suit brought by the plaintiff/appellant against the defendants/respondents, the plaintiff, as registered owner of certain land ("the said land"), had in 1990 obtained a loan from the fourth defendant for RM2.5 million under a security of a debenture and a National Land Code ('NLC') charge on the said land. In May 1992, the fourth defendant recalled the loan and appointed the first three defendants as receivers and managers of the plaintiff pursuant to the debenture. On 11 August 1992, the receivers and managers called for tenders to sell the said land. On 24 September 1992, the only two directors, in the name of the plaintiff company, sought and obtained an *ex parte* injunction against the defendants to restrain the sale, pending an *inter partes* hearing. On 8 September 1992, the fifth defendant made an offer to purchase the said land for RM4 million. On 23 December 1993, the High Court at the *inter partes* hearing of the injunction, found for the defendants on the issue of the directors' lack of standing to institute the suit. The Federal Court dismissed the plaintiff's appeal on 24 September 1996. Subsequently a sale of the said

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land was concluded with the fifth defendant for RM4.8 million. The said land was thereafter registered in the name of the sixth defendant on 29 September 1994.

In the present suit, the appellant sought, *inter alia*, a declaration that the transfer to the 6th respondent purchaser was null and void and of no effect by reason of s. 340(2)(b) or alternatively s. 340(4)(b) of the NLC. The ground on which they relied was that there was a restriction on the title which had been transferred to the 6th respondent who, incidentally, was not a party to the first suit. The instant respondents successfully argued before the learned judge that the appellant's claim should be struck out on the ground of *res judicata.* The learned judge held that he was bound by the decision of the Federal Court and struck out the second suit.

One of the main issues in the earlier suit was whether the appellant's directors could bring an action in the name of the company against the defendants in that suit. The incidental question which formed the main ground in the earlier suit was whether the receivers and managers had power to sell the appellant's immoveable property, the subject of a registered charge, pursuant to the power vested in them by the debenture under which they were appointed. The decision of the Federal Court in the earlier suit was given on 24 September 1996. The originating summons in the present action *ie,* the second suit, was dated 3 April 1996, that is to say, some five months before that decision. The learned judge in the present case made an order striking out the second suit on 14 March 1997. On 24 May 1997, the Federal Court handed down its landmark decision in *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805. That case held that a chargee of land could not by a contract – and a debenture is a contract – exclude the operation of ss. 254 to 265 of the NLC.

The respondents in the present suit raised the issue of *res judicata.* The 4th respondent further submitted that if the second suit is permitted to proceed, it would amount to an interference with the powers of the 1st to 3rd respondents as receivers and managers.

Held (allowing the appeal and setting aside the orders of the High Court)
Per Gopal Sri Ram JCA:

[1] There can be little or no doubt that if *Kimlin* had been decided before the Federal Court handed down its decision in the appeal in respect of the first suit, it could not have held that any judgment in favour of the instant appellant in the first suit would not have benefited it. This is because if there was no power in the receivers and managers (the instant 1st to 3rd respondents) to sell the land in question, the purported sale would have been set aside thereby reverting the land to the appellant. So too, had the learned judge heard the application to strike out the amended summons in the present instance after *Kimlin*, he would have refused the application. (pp 50 H-I & 51 A)

[2] In relation to the issue of *res judicata*, if the second suit was permitted to proceed it would not favour an abuse of process. Abuse of process would be favoured rather than prevented by refusing the appellant permission to reopen the issue. The effect of *Kimlin* is that the 1st to the 3rd respondents had no power to deal with the subject property – the sole landed asset of the appellant – in the way in which they did. The 4th respondent should have resorted to the provisions of the NLC to have the land sold off to satisfy the debt owed it. It did not. There were sufficient facts here to show that justice favoured the re-opening of the propriety of the sale of the subject land by the 1st to 3rd defendants as receivers and managers. (pp 51 D, 53 H & 54 A & C)

[3] If the receivers and managers had no right to sell, then no title could ever pass to the purchaser – *nemo dat quod non habet.* It follows as a matter of essential justice that the issues should be re-opened because persons who are not in law entitled to have property must be made to return it. (p 54 D & I)

[4] It cannot be said that penalising the receivers and managers for doing an act, namely selling and transferring the subject land, they were not entitled in law to do is hardly an interference with their function. If that were so every wrongdoer will have a *carte blanche.* So there is really no interference at all. It is only a question of making the wrongdoers accountable. And that is quite in order. (p 58 A - B)

[5] Under our company law the 1st to 3rd respondents as receivers and managers are liable for any misfeasance on their part. The relevant provision is s. 192(2) of the Companies Act 1965 ("the 1965 Act"). The section is remedial. It was introduced into the 1965 Act to remedy the grave injustice that existed at common law. Being a remedial provision, it is to be interpreted liberally in favour of those in whose favour it operates. The difference between s. 305(1) and s. 192(2) is that whereas the former merely provides a summary method of enforcing pre-existing rights, the latter is remedial in that it creates a new right – a new cause of action – that never existed before. Great caution should be taken when referring to cases decided under s. 305(1) because those cases are not dealing with a remedial provision. (pp 55 H, 56 E & 57 A, G - H)

[Bahasa Malaysia *Translation Of Headnotes*

Dalam satu tindakan sebelum ini yang dibawa oleh plaintif/perayu terhadap defendan-defendan/responden-responden, plaintif, sebagai pemilik berdaftar sebidang land ("tanah tersebut") telah pada tahun 1990 mendapatkan satu pinjaman daripada defendan keempat untuk sejumlah RM2.5 juta berdasarkan sekuriti satu debentur dan satu gadaian KTN di atas tanah tersebut. Pada Mei, 1992, defendan keempat telah memanggil balik pinjaman tersebut dan telah melantik tiga defendan-defendan yang pertama sebagai penerima dan pengurus untuk plaintif di bawah debentur tersebut. Pada 11 Ogos 1992, penerima dan pengurus tersebut telah memanggil untuk tender bagi menjual tanah tersebut. Pada 24 September 1992 kedua-dua pengarah tunggal, dalam nama syarikat plaintif, telah memohon dan mendapatkan satu injunksi *ex parte* terhadap defendan-defendan untuk menghalang penjualan, sehingga pendengaran secara *inter partes*. Pada 8 September 1992 defendan kelima telah membuat tawaran untuk membeli tanah tersebut untuk RM4 juta. Pada 23 Disember 1993, Mahkamah Tinggi dalam pendengaran permohonan untuk injunksi secara *inter partes*, telah membuat penemuan bagi pihak defendan-defendan atas isu tiadanya kedudukan bagi pengarah-pengarah untuk memulakan tindakan itu. Mahkamah Persekutuan telah menolak rayuan plaintif pada 24 September 1996. Kemudiannya tanah tersebut telah dijual kepada defendan kelima untuk RM4.8 juta. Tanah tersebut kemudiannya didaftarkan di dalam nama defendan keenam pada 29 September 1994.

A Dalam tindakan ini, perayu telah memohon, *inter alia*, satu deklarasi bahawa pindahmilik tersebut kepada responden keenam adalah batal dan taksah dan tidak mempunyai efek atas sebab s. 340(2)(b) atau secara alternatif s. 340(4)(b) KTN. Mereka telah bergantung kepada alasan bahawa terdapat satu sekatan pada
B hakmilik tersebut yang telah dipindahmilik kepada responden keenam yang mana, secara kebetulannya, bukan satu pihak dalam tindakan pertama itu. Responden-responden dalam rayuan ini telah berhujah dengan berjaya di hadapan hakim yang bijaksana bahawa tuntutan perayu perlu dibatalkan atas alasan *res judicata*. Hakim
C yang bijaksana telah memutuskan bahawa beliau terikat dengan keputusan Mahkamah Persekutuan dan telah membatalkan tindakan kedua itu.

Salah satu isu yang utama dalam tindakan pertama itu adalah sama
D ada pengarah-pengarah perayu boleh memulakan satu tindakan atas nama syarikat terhadap defendan-defendan dalam tindakan itu. Satu persoalan sampingan yang telah membentuk isu utama dalam tindakan pertama itu adalah sama ada penerima dan pengurus mempunyai kuasa untuk menjual harta takalih perayu, yang
E menjadi subjek satu gadaian berdaftar, lanjutan daripada kuasa yang diberikan kepada mereka oleh debentur di bawah mana mereka dilantik. Keputusan Mahkamah Persekutuan di dalam tindakan pertama telah diberikan pada 24 September 1996. Saman pemula dalam tindakan ini iaitu tindakan kedua telah bertarikh
F 3 April 1996, yakni, lebih kurang lima bulan sebelum keputusan itu. Hakim yang bijaksana dalam kes ini telah membuat satu perintah membatalkan tindakan kedua ini pada 14 Mac 1997. Pada 24 Mei 1997, Mahkamah Persekutuan telah memberikan keputusan pentingnya dalam kes *Kimlin Housing Development Sdn Bhd v. Bank*
G *Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805. Kes tersebut telah memutuskan bahawa pemegang gadaian sesebuah tanah tidak boleh melalui kontrak – dan debentur adalah satu kontrak – menyingkirkan pemakaian ss. 254 hingga 265 KTN.

H Responden-responden dalam tindakan ini telah membangkitkan isu *res judicata*. Responden keempat telah selanjutnya berhujah bahawa sekiranya tindakan kedua ini dibenarkan berjalan, ianya akan merupakan satu percampuran tangan dengan kuasa-kuasa responden-responden pertama hingga ketiga sebagai penerima dan
I pengurus.

Diputuskan (membenarkan rayuan dan mengenepikan perintah-perintah Mahkamah Tinggi)
Oleh Gopal Sri Ram HMR:

[1] Adalah tidak diragui bahawa sekiranya *Kimlin* telah diputuskan sebelum Mahkamah Persekutuan memberi keputusannya dalam rayuan berkenaan dengan tindakan pertama itu, ia sudah tentu tidak akan memutuskan bahawa sebarang penghakiman yang berpihak kepada perayu di dalam tindakan pertama itu tidak akan memanfaatkannya. Ini adalah kerana, sekiranya tidak ada kuasa pada penerima dan pengurus (responden-responden pertama hingga ketiga di sini) untuk menjual tanah tersebut, jualan yang dikatakan itu akan diketepikan dan dengan itu mengembalikan tanah tersebut kepada perayu. Sama juga, sekiranya hakim yang bijaksana telah mendengar permohonan untuk membatalkan saman terpinda dalam kes ini selepas *Kimlin*, beliau sudah tentu akan menolak permohonan tersebut.

[2] Berkenaan dengan isu *res judicata*, sekiranya tindakan kedua itu dibenarkan berjalan ia tidak akan menyebabkan satu penyalahgunaan proses. Penyalahgunaan proses akan disebabkan dan bukan dihalang sekiranya perayu tidak dibenarkan membuka semula isu tersebut. Efek *Kimlin* ialah responden-responden pertama hingga ketiga tidak mempunyai kuasa untuk berurusan dengan harta tersebut – aset bertanah yang tunggal kepunyaan perayu – dalam cara yang mana mereka telah melakukannya. Responden keempat sepatutnya bergantung kepada peruntukkan KTN untuk menjual tanah tersebut untuk membayar hutang yang perlu dibayar kepadanya. Terdapat fakta-fakta yang secukupnya di sini untuk menunjukkan bahawa keadilan berpihak kepada membuka semula kesahan penjualan tanah tersebut oleh defendan-defendan pertama hingga ketiga sebagai penerima dan pengurus.

[3] Sekiranya penerima dan pengurus tidak berhak untuk menjual, hakmilik tidak boleh berpindah kepada pembeli – *nemo dat quod non habet*. Oleh itu sebagai satu perkara keadilan asasi isu-isu tersebut perlu dibuka semula kerana orang yang di bawah undang-undang tidak berhak kepada sesuatu harta itu mesti diperintah memulangkannya.

[4] Tidak boleh dikatakan bahawa menghukum penerima dan pengurus kerana melakukan satu tindakan, yakni menjual dan memindah milik tanah tersebut, yang mana mereka tidak berhak berbuat di bawah undang-undang adalah satu percampuran tangan dengan tugas-tugas mereka. Sekiranya demikian, setiap pesalah akan mempunyai *carte blanche*. Jadi, langsung tidak ada percampuran tangan. Ianya hanyalah satu persoalan menjadikan pesalah bertanggungjawab. Dan ini adalah boleh diterima.

[5] Di bawah undang-undang syarikat kita, responden-responden pertama hingga ketiga sebagai penerima dan pengurus adalah bertanggungjawab untuk sebarang misfeasans pada pihak mereka. Peruntukkan yang relevan adalah s. 192(2) Akta Syarikat 1965 ("Akta tersebut"). Seksyen tersebut adalah bertujuan sebagai remedi. Ianya telah diperkenalkan ke dalam akta tersebut untuk meremedikan ketidakadilan yang ketara yang telah wujud pada common law. Oleh kerana ianya adalah peruntukkan yang bersifatkan remedi, ianya sepatutnya ditafsirkan secara liberal berpihak kepada mereka yang sepatutnya bermanfaat daripadanya. Perbezaan di antara s. 305(1) dan s. 192(2) adalah yang terdahulu itu hanya memperuntukkan satu kaedah terus untuk melaksanakan hak-hak yang sedia wujud manakala yang terkemudiannya itu adalah bersifatkan remedi yakni ia mewujudkan satu hak baru – satu kausa tindakan baru – yang tidak wujud sebelum dari itu. Perhatian yang sepenuhnya perlu diambil apabila merujuk pada kes-kes yang diputuskan di bawah s. 305(1) kerana kes-kes tersebut tidak berkaitan dengan peruntukkan yang bersifatkan remedi.

Case(s) referred to:

Arnold v. National Westminster Bank Plc [1991] 2 AC 93 ***(refd)***

Carl-Zeiss Stiftung v. Rayner and Keeler Ltd & Ors (No 2) [1966] 2 All ER 532 ***(refd)***

Cavendish Bentinck v. Fenn [1887] 12 App Cas 652 ***(refd)***

Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 4 MLJ 346 ***(refd)***

K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd v. Mbf Finance Bhd [2005] 1 CLJ 793 CA ***(refd)***

Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd & Ors [1997] 3 CLJ 274 SC ***(refd)***

M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd [1994] 2 CLJ 15 SC ***(refd)***

Newhart Developments Ltd v. Co-operative Commercial Banks Ltd [1978] 1 QB 814 ***(refd)***
Re B Johnson & Co (Builders) Ltd [1955] 1 Ch D 634 ***(refd)***
Roberto Building Material Pte Ltd v. Oversea-Chinese Banking Corp (No 2) [2003] 3 SLR 217 ***(refd)***
Tan Ah Teck v. Coffral (M) Sdn Bhd [1991] 3 CLJ 2227; [1991] 4 CLJ (Rep) 63 HC ***(refd)***
Willis v. Willis [1941] MLJ 169 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 4(1)(b), 192(2), 305(1)
Courts of Judicature Act 1964, s. 42
National Land Code, ss. 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 340(2)(b), (4)(b)

Companies Act [Sing], s. 192(2)
Companies Act 1862 [UK], s. 165

For the appellant - L Sabapathy (Tharminder Singh & Wong Guo Bin with him); M/s Logan Sabapathy & Co
For the 1st-3rd respondents - Leong Kok Keong; M/s Kean Chye & Sivalingam
For the 4th respondent - Mohd Ariff Yusof (Joyce Uma Segajananthan with him); M/s Cheang & Ariff
For the 5th-6th respondents - Kerpal Singh; M/s Bachan & Kartar

[Appeal from High Court, Ipoh; Originating Summons No: 24-54-1996]

Reported by Amutha Suppayah

JUDGMENT

Gopal Sri Ram JCA:
This case has a history which concerns the decision an earlier suit brought by the instant appellant. The learned judge set it out in his judgment. I need only quote him:

> 1. The plaintiff, as registered owner of the said land had in 1990 obtained a loan from the fourth defendant for RM2.5 million under a security of a debenture and a NLC charge on the said land.
>
> 2. In May 1992, the fourth defendant recalled the loan and appointed the first three defendants as receivers and managers of the plaintiff pursuant to the debenture.

3. On 11.8.1992, the receivers and managers called for tenders to sell the said land. On 24.9.92 the only two directors, in the name of the plaintiff company, sought and obtained an *ex parte* injunction against the defendants to restrain the sale, pending an *inter partes* hearing.

4. On 8.9.92 the fifth defendant had made an offer to purchase the said land for RM4 million.

5. On 23.12.93, the High Court at the *inter partes* hearing of the injunction, found for the defendants on the issue of the directors' lack of standing to institute the suit in Simpang Empat No. 1. The Federal Court dismissed the plaintiff's appeal on 24.9.96.

6. Subsequently a sale of the said land was concluded with the fifth defendant for RM4.8 million. The said land was thereafter registered in the name of the sixth defendant on 29.9.94.

Now, one of the main – if not the only – issue in the earlier suit was whether the appellant's directors could bring an action in the name of the company against the defendants in that suit. The incidental question which formed the main ground of the instant appellant's challenge in the earlier suit was whether the receivers and managers had power to sell the appellant's immoveable property, the subject of a registered charge, pursuant to the power vested in them by the debenture under which they were appointed. That is why the directors sought and obtained an *ex parte* injunction restraining the sale, which injunction was dissolved later by the High Court on grounds of *locus standi*. That issue was not decided by the Federal Court which gave its following decision:

> After considering submissions by both Counsel and the facts and circumstances of the case, we are of the unanimous view that the appeal be dismissed with costs to the respondents to be taxed if not agreed. Deposit to account of costs.
>
> The appointment of receivers pursuant to a debenture does not, in itself, prevent the directors of the company creating the debenture from pursuing a right of action. The directors can pursue if in doing so, it would be in the interest of the company and would not impinge prejudicially upon the position of the debenture holders by threatening or imperilling the assets which are subject of the charge. Much depends on the facts and circumstance of the each case.

> In the present case, it has not, in our view, been shown that the action would benefit the company thereby justifying the action. Also, the directors had not given indemnity for costs. The appeal is dismissed.

No grounds of judgment were, however, delivered. But I must draw attention to certain parts of the relevant chronology as it has an important bearing on the outcome of this appeal. As you may have noticed, the decision of the Federal Court in the earlier suit was given on 24 September 1996. The originating summons in the present action (I shall call it "the second suit"), as amended, is dated 3 April 1996, that is to say, some five months before that decision. The learned judge in the present case made an order striking out the second suit on 14 March 1997. He delivered his written grounds of judgment on 3 May 1997. On 24 May 1997, the Federal Court handed down its landmark decision in *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd & Ors* [1997] 3 CLJ 274. That case held that a chargee of land could not by a contract – and a debenture is a contract – exclude the operation of ss. 254 to 265 of the National Land Code 1965 ("the Code"). In his judgment, Edgar Joseph Jr FCJ said this:

> In our view, therefore, the provisions of the Code as to the rights of chargors are designed for their protection and cannot be waived; nor can the chargor contract himself out of the Code. It follows that no power of sale can be conferred by a chargor under the Code on a chargee himself by way of a debenture or power of attorney or otherwise, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with the rigid procedure laid down in the Code. In such circumstances, any power of sale which purports to be conferred on a chargee himself, omitting all mention of notice and periods of default by a debenture or power of attorney and the necessity for obtaining a judicial sale would be invalid and ineffective to entitle a purchaser to be registered as owner.

There can be little or no doubt that if Kimlin had been decided before the Federal Court handed down its decision in the appeal in respect of the first suit, it would not – indeed it could not – have held that any judgment in favour of the instant appellant in the first suit would not have benefited it. This is because if there was no power in the receivers and managers (the instant 1st to 3rd respondents) to sell the land in question, the purported sale would have been set aside thereby reverting the land to the appellant. So too, had the learned judge heard the application to

A strike out the amended summons in the present instance after Kimlin, he would have refused the application. Again, because, as a matter of precedent, *Kimlin*, as a later decision, had the effect of overreaching the decision in the first suit.

B In its amended originating summons, the appellant sought, *inter alia*, a declaration that the transfer to the instant 6th respondent purchaser was null and void and of no effect by reason of s. 340(2)(b) or alternatively s. 340(4)(b) of the Code. The ground on which they relied was that there was a restriction on the title C which had been transferred to the 6th respondent who, incidentally, was not a party to the first suit. The instant respondents successfully argued before the learned judge that the appellant's claim should be struck out on the ground of *res judicata*. The learned judge held that he was bound by the decision D of the Federal Court and, as I have already said, struck out the second suit.

The first point that has to be decided is whether *res judicata* applies here. In order to do that, it is, I think, desirable to remind myself of the nature and ambit of the doctrine. In *Chee Pok Choy* E *& Ors v. Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346, this court had occasion to discuss these points. And I quote:

> Now, *res judicata* is not merely a technical rule of pleading. It is a doctrine of substantial justice. It is a process whereby justice is F achieved procedurally by precluding a party from re-agitating in subsequent proceedings a complaint or an issue that has, or could fairly have been disposed in earlier proceedings between the same parties or their privies. It is merely equity in action in the procedural arena. It is sometimes referred to as the rule in *Henderson v. Henderson* [1843] 67 ER 313. In that case, Wigram G VC said:
>
> > In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court H of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only I because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata*

> applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

The doctrine may thus be seen to encompass several categories. In its narrowest sense, *res judicata*, I think, refers to estoppel by record. It refers to the actual decision of the earlier action or proceeding. In its wider sense, it encompasses issues and causes of action that could justly and fairly have been equally adjudicated in the earlier suit or proceeding. This wider operation of the doctrine is sometimes referred to 'constructive *res judicata*'. It houses the twin concepts of issue estoppel and cause of action estoppel. Like the tree of which they form the branches, they are designed to ensure that there is finality in litigation.

Pausing for a moment, I think that it is essential to bear in mind that Wigram VC spoke these words in the Court of Chancery, and that the court he referred to was that court of which he was the Vice Chancellor at the time. I make mention of these matters in order to demonstrate that the doctrine of *res judicata* has its roots in equity and hence retains its discretionary nature that is common to all equitable doctrines.

Now, there is a dimension to the doctrine of *res judicata* that is not always appreciated. It is this. Since the doctrine (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result. And there is respectable authority in support of the view I have just expressed.

In *Carl-Zeiss Stiftung v. Rayner and Keeler Ltd & Ors (No 2)* [1966] 2 All ER 532 at p 573, Lord Upjohn said:

> As my noble and learned friend, Lord Reid, has already pointed out there may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reasons have abandoned a particular issue. It may be most unjust to hold him precluded from raising that issue in subsequent litigation (and see Lord Maugham LC's observations in the *New Brunswick* case ([1938] 4 All ER 747 at p 755; [1939] AC 1 at p 21)). *All*

A *estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.* (emphasis added.)

B In *Arnold v. National Westminster Bank Plc* [1991] 2 AC 93 at p. 109, Lord Keith of Kinkel expressed the following view:

> In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further
C material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. *One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible*
D *application of it may have the opposite result*, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the *Carl-Zeiss* case [1966] 2 All ER 536 at p 573, [1967] 1 AC 853 at p 947. (emphasis added)

E In a later passage, I find Lord Keith saying:

> Estoppel per *rem judicatam*, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process. In the present case I consider that abuse of process would be favoured rather than prevented by refusing the
F respondents permission to reopen the disputed issue.
>
> These views were very recently reaffirmed by the House of Lords in *Johnson v. Gore Wood & Co* [2000] (Unreported, speeches published on 14 December 2000) [now reported in [2001] 1 All ER 481]. See in particular the speech of Lord Bingham of
G Cornhill, at pp. 8-10 of the transcript.
>
> On the authorities discussed thus far, the principle comes to this. Whether *res judicata* in the wider sense should be permitted to bar a claim is a matter that is to be determined on the facts of each case, always having regard to where the justice of the individual
H and particular case lies.

So the question that is to be asked here is this: if the second suit is permitted to proceed will it favour an abuse of process? In my judgment it will not. Indeed, I am satisfied that abuse of process
I would be favoured rather than prevented by refusing the appellant permission to reopen the issue. I will explain why.

As I have already said, the effect of *Kimlin* is that the 1st to the 3rd respondents had no power to deal with the subject property – the sole landed asset of the appellant – in the way in which they did. The 4th respondent should have resorted to the provisions of the Code to have the land sold off to satisfy the debt owed it. It did not. Having read the voluminous appeal record in this case more than once, it seems not unreasonable to reach the very tentative conclusion that at all material times the 1st to the 3rd respondents were acting on the dictation of the 4th respondent. So, if a wrong was committed, they were all parties to it. I am not for a moment to be taken as saying that a wrong or an injustice was done in this case. All I am saying is that there are sufficient facts here to show that justice favours the re-opening of the propriety of the sale of the subject land by the 1st to 3rd defendants as receivers and managers.

That brings me to the other respondents, in particular the 6th respondent. If the receivers and managers had no right to sell, then no title could ever pass to the purchaser – *nemo dat quod non habe*t. That has been settled by the judgment of Wan Yahya SCJ in *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd* [1994] 2 CLJ 15, where he said:

> A purchaser of land might fail to obtain a good title in two distinct ways. Firstly, if the title of the vendor is bad. Secondly, even if the vendor has a good title, there might be some invalidating defects in the conveyance or transaction in which the purchaser attempted to obtain the title. These transactions might be void or voidable for a variety of reasons. In the case of a defect in the vendor's title, the common law rule, is that no person can give a better title than he had - *nemo dat quod non habet*. There are, however, important exceptions to this rule, in particular the qualification made under the proviso to s 340(3) of our National Land Code 1965 where a bona fide purchaser for value without notice of the defeasible nature of the vendor's title acquires an immediate indefeasible title. In the case where the vendor's title is good but the instrument which was used by a purchaser for registration is void or voidable, the effect on such registration will only confer on the person in whose name the land is registered, what is usually referred to as deferred indefeasibility, - see *Gibbs v. Messer* [1891] AC 248. Under this principle, the registration of the insufficient or void instrument can be set aside.

It follows as a matter of essential justice that the issues should be re-opened because persons who are not in law entitled to have property must be made to return it.

I now come to the submission made by Mr Mohd Ariff Yusof of counsel for the 4th respondent. He says that if the second suit is permitted to proceed, it would amount to an interference with the powers of the 1st to 3rd respondents as receivers and managers. He relies in support of his submission on the decision of the English Court of Appeal in *Newhart Developments Ltd v. Co-operative Commercial Banks Ltd* [1978] 1 QB 814. In fact, counsel for all the instant respondents repeatedly referred us to passages in the judgments in Newhart Developments as if they were some magical incantation. With respect, there is no magic. The principle to be distilled from that case was summed up by Wan Yahya J in *Tan Ah Teck v. Coffral (M) Sdn Bhd* [1991] 3 CLJ 2227 at p. 2230 in the following passage with which I am entirely in agreement:

> The appointment of a debenture holder receiver even with authority to act as agent of the company does not operate to terminate the director's control of service with the company unless such appointment of receiver is inconsistent with the continued employment of a managing director - see *Griffiths v. Secretary of State for Social Services* [1973] 3 All ER 1184. In *Newhart Developments Ltd v. Co-operative Commercial Banks Ltd* [1978] 1 QB 814, it was held that a provision in a debenture empowering the receiver to bring an action in the name of the company whose assets were charged was merely an enabling provision, investing the receiver with the capacity to bring such an action, and did not divest the company's directors of their power … provided that the proceedings did not interfere with the receiver's function of getting in the company's assets or prejudicially affect the debenture holder by imperilling the assets.

Learned counsel for the 4th respondent submits that if we were to permit the second suit to proceed it would interfere with the receivers' functions in getting in the assets of the appellant and that it would prejudicially affect the 4th respondent debenture holder by imperilling the appellant's assets. With respect, I think that nothing could be further from reality.

In the first place, under our company law the 1st to 3rd respondents as receivers and managers are liable for any misfeasance on their part. Let me digress for a moment to discuss the law on the point. The relevant provision is s. 192(2) of the Companies Act 1965 ("the 1965 Act") which was drawn to the attention of all counsel before us during argument. This is what that subsection says:

> If it appears that any receiver or manager of the property of a company has misapplied or retained or become liable or accountable for any money or property of the company or being guilty of any misfeasance or breach of trust or duty in relation to the company, the Court may, on the application of any creditor or contributory or of the liquidator, examine into the conduct of the receiver or manager and compel him to repay or restore the money or property or any part thereof with interest at such rate as the Court thinks just or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust or duty as the Court thinks just.

The section is new. It was not in the Companies Ordinance 1924 or the Companies Ordinance 1940 of Malaya. It has no parallel in the United Kingdom, Australia, New Zealand, Canada and India. As presently advised it is only to be found in the Singapore Companies Act (Cap 50, 1994 Rev Ed) and the Ghanaian Companies Act. The section has not been judicially considered in either Malaysia or Singapore. I am not aware whether the courts of Ghana have had any occasion to discuss the section.

The section is remedial. It was introduced into the 1965 Act to remedy the grave injustice that exists at common law (which term I use to include the doctrines and principles of equity). At common law, a receiver and manager appointed under a power conferred by a debenture does not stand in a fiduciary position to the borrower company over whose property and affairs he exercises control. Nor does he or she owe any general duty to the borrower company. See, *Re B Johnson & Co (Builders) Ltd* [1955] 1 Ch D 634. His or her primary duty is to the debenture holder. See, *Roberto Building Material Pte Ltd v. Oversea-Chinese Banking Corp (No. 2)* [2003] 3 SLR 217. (It is to be noted, however, that s. 192(2) of the Singapore Companies Act was not referred to the Court of Appeal by counsel on either side in that case.) Such a receiver and manager is also not an officer of the borrower company as defined by s. 4(1)(b) of the 1965 Act. See, *K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (in liquidation) v. Mbf Finance Bhd* [2005] 1 CLJ 793. That means that he or she does not come within s. 305(1) of the 1965 Act to which I will refer shortly. So, at common law, a receiver and manager appointed under a debenture could destroy the borrower company in all sorts of ways and there is nothing that the shareholders or creditors or the liquidator of that company could do. They are helpless. Section 192(2) remedies

that by introducing a cause of action that did not previously exist. Being a remedial provision, it is to be interpreted liberally in favour of those in whose favour it operates. See, *Willis v. Willis* [1941] MLJ 169.

Now, I must make mention of s. 305(1) of the Companies Act which does have equipollents in other Commonwealth jurisdictions. Section 305(1) (the relevant words of which are *in pari materia* with s. 192(2) I have emphasis added) reads as follows:

> (1) If in the course of winding up it appears that any person who has taken part in the formation or promotion of the company or any past or present liquidator or officer *has misapplied or retained or become liable or accountable for any money or property of the company or been guilty of any misfeasance or breach of trust or duty in relation to the company, the Court may on the application of the liquidator or of any creditor or contributory examine into the conduct* of that person, liquidator or officer and compel him to repay or restore the money or property or any part thereof with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust or duty as the Court thinks just.

In *Cavendish Bentinck v. Fenn* [1887] 12 App Cas 652, Lord MacNaghten, when discussing s. 165 of the United Kingdom Companies Act 1862, which is *ipsissima verba* our s. 305(1) said that the section:

> creates no new offence and **gives no new rights**, but that it only provides a summary and efficient remedy for rights which, apart from that section, might have been vindicated either at law or in equity. (emphasis added.)

The words in the above quoted passage upon which I have placed emphasis are what set s. 305(1) apart from s. 192(2). Whereas the former merely provides a summary method of enforcing pre-existing rights, the latter is remedial in that it creates a new right – a new cause of action – that never existed before. It is therefore my judgment that great caution should be taken when referring to cases decided under s. 305(1) or its equipollent provision in other Commonwealth statutes because those cases are not dealing with a remedial provision.

Returning to the present case, it cannot by any stretch of the imagination be said that penalising the receivers and managers for doing an act, namely selling and transferring the subject land, they were not entitled in law to do is hardly an interference with their function. If that were so every wrongdoer will have a carte blanche. So there is really no interference at all. It is only a question of making the wrongdoers accountable. And that is quite in order.

Secondly, no question of imperilling the appellant's assets arises here. Quite the opposite. If the appellant's summons proceeds to trial and terminates in the appellant's favour, then the subject land returns to the appellant. There is a benefit to the appellant and no peril to the asset.

Taking a step back once again and viewing the facts of this case in its totality, it is clear that the justice of the case lies in permitting the summons to proceed and to have the issues re-opened. Of course, as appeared during argument, the originating summons may have to be suitably amended to add one or more of the appellant's shareholders as co-plaintiffs. If need be, further affidavit evidence may be put in to support the Kimlin ground of complaint. I say "if need be" advisedly because this is really a point of law that arises logically from the facts already pleaded.

For the reasons already given, this appeal succeeds. The orders of the High Court are set aside. The amended originating summons is restored to file and remitted to the High Court for mention before the judge in chambers on a date and at a time that will be fixed upon delivery of this judgment with a direction for the judge to fix an early date for the hearing and disposal of the matter. The appellant will have all its costs here and in the court below. The taxing registrar in this court and in the court below is directed to allow only one item of getting up in the appellant's bill. The appellant shall, however, be given all its profit costs and out of pockets as separately incurred against each respondent. The deposit in court shall be refunded to the appellant.

My learned brother Vincent Ng Kim Khoay, J has seen this judgment in draft and has expressed his agreement with it.

A I must add by way of postscript that this appeal was heard by a Bench of this court which included my learned sister Rahmah bte Hussein, JCA who has since retired. This judgment is accordingly delivered pursuant to s. 42 of the Courts of Judicature Act 1964, as amended.

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